

106 FERC ¶ 61,306  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, and Joseph T. Kelliher.

PacifiCorp

Project No. 1927-019

ORDER ON REHEARING

(Issued March 26, 2004)

1. PacifiCorp seeks rehearing of the Commission's November 18, 2003 Order approving a settlement offer and issuing it a new license for its North Umpqua Project No. 1927. PacifiCorp, 105 FERC ¶ 61,237 (2003). Rehearing of the order is also sought, collectively, by Umpqua Watersheds, Umpqua Valley Audubon Society, Oregon Natural Resources Council, Steamboaters, the North Umpqua Foundation, Pacific Rivers Council, Oregon Trout, American Rivers, and Waterwatch of Oregon (the Conservation Groups).<sup>1</sup> We grant rehearing to the extent indicated below.

**BACKGROUND**

2. The 185.5-megawatt North Umpqua Project consists of eight developments, each with a powerhouse and a dam, on the North Umpqua River and two of its tributaries, in Douglas County, Oregon. The project is located partly on lands administered by the Forest Service and the U.S. Department of the Interior's Bureau of Land Management (BLM). The original license for the project expired in January 1997.

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<sup>1</sup>Under the Commission's procedural rules, 18 C.F.R. § 385.713(b), a request for rehearing may be filed only by a party to a proceeding. For the purposes of a proceeding such as the present one, a party means a person that has filed an application or a motion to intervene. 18 C.F.R. § 385.102(c). The Commission's records do not reflect that Oregon Trout filed a motion to intervene in the relicensing proceeding. Therefore, we will entertain the jointly-filed request for rehearing only to the extent that it was filed by the remaining Conservation Groups, which filed motions to intervene and are parties.

3. PacifiCorp filed an application for new license on January 30, 1995. Subsequently, PacifiCorp entered into settlement discussions that culminated in the filing of an offer of settlement on June 21, 2001. The offer included a settlement agreement (Agreement) intended to resolve all issues associated with issuance of a new license. Parties to the Agreement (the settlement parties) were PacifiCorp, the Forest Service, BLM, Interior's Fish and Wildlife Service (FWS), the U.S. Department of Commerce's National Marine Fisheries Service (NMFS), and the State of Oregon's Departments of Environmental Quality, Fish and Wildlife, and Water Resources. On November 4, 2002, PacifiCorp filed an amendment to the Agreement on behalf of the settlement parties.

4. The Commission solicited recommendations, terms, and conditions when the application was found ready for environmental analysis, and revised recommendations, terms, and conditions on three later occasions, the last one being the filing of the amendment to the Agreement. In the Agreement, the settlement parties asked the Commission to accept and incorporate, without material modification, all of the final terms and conditions that the governmental settlement parties filed with the Commission in connection with the Agreement, and to consider any earlier filings superseded by the Agreement to the extent that they were inconsistent with it.

5. The Agreement consists of 24 sections and seven appendices. The heart of the Agreement is its "Protection, Mitigation, and Enhancement Measures," which the Agreement identifies as the measures set forth in sections 4 through 19. The final terms and conditions filed by the governmental parties were intended to be consistent with these measures.

6. In our November 18 Order, we found the offer of settlement to be in the public interest, and we issued a license authorizing operation of the project in accordance with the settlement terms, with additional enhancement measures that had been recommended by the Commission staff in its Final Environmental Impact Statement (EIS). We also made the license subject to mandatory conditions submitted by several of the governmental agencies that were parties to the Agreement. These included water quality certification conditions submitted by the Oregon Department of Environmental Quality under Section 401 of the Clean Water Act,<sup>2</sup> conditions submitted by the Forest Service

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<sup>2</sup>Under Section 401(d) of the Clean Water Act, 33 U.S.C. § 1341(d), certification issued by a State in connection with the issuance of any Federal license shall become a condition of that license.

and BLM under Section 4(e) of the Federal Power Act (FPA),<sup>3</sup> and fishway prescriptions submitted by the FWS and NMFS under Section 18 of the FPA.<sup>4</sup>

## DISCUSSION

### A. PacifiCorp's Rehearing Request

7. PacifiCorp seeks rehearing or clarification of two aspects of our order that it believes are inconsistent with the settlement underlying the order.<sup>5</sup>

8. First, PacifiCorp notes the following statement in our order:<sup>6</sup>

Finally, certain provisions of the Agreement or of the agencies' conditions contemplate the possibility that the licensee may undertake actions, such as mitigation measures, outside of the present project boundary. If any such actions become required, the licensee will have to request an amendment of the license to include within the project boundary the lands on which those measures will occur.

PacifiCorp is concerned that this statement could be read to apply to the protection, mitigation, and enhancement measures provided for under section 19 of the Agreement.

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<sup>3</sup>Under Section 4(e) of the FPA, 16 U.S.C. § 797(e), the Commission must include in any license for a project located within a Federal reservation all conditions that the agency managing the reservation shall deem necessary for the adequate protection and utilization of that reservation.

<sup>4</sup>Under Section 18 of the FPA, 16 U.S.C. § 811, the Commission must require a licensee to construct, operate, and maintain such fishways as the Secretary of the Interior or the Secretary of Commerce may prescribe.

<sup>5</sup>The Forest Service and the Oregon Department of Fish and Wildlife submitted letters in support of PacifiCorp's rehearing request. PacifiCorp states that all the other settlement parties have represented to it that they either concur with or do not oppose its rehearing request.

<sup>6</sup>105 FERC ¶ 61,237 at P 114.

Section 19 provides that PacifiCorp shall establish four mitigation funds to offset project impacts on fish and wildlife that are not otherwise mitigated by the measures set forth in sections 4 through 18 of the Agreement.<sup>7</sup> Section 19 also describes the types of activities to be undertaken, who may undertake them, and which State or Federal resource agency will allocate the funds and direct the activities. However, license Article 405 incorporates only PacifiCorp's section 19 funding and reporting obligations.

9. PacifiCorp affirms that section 19 of the Agreement was not intended to impose on it any license requirements beyond those of funding and reporting. It adds that, while it may or may not be the entity that actually implements measures funded under section 19, the settlement parties intended that performance of the measures would be enforced through the Agreement itself, as a matter of contract.<sup>8</sup>

10. In approving the Agreement in this proceeding, we did not seek to elevate to the status of license requirements activities that the settlement parties did not ask us to enforce. Our general statement regarding the need to expand the project boundary therefore applies only to the extent the license itself requires the licensee to conduct ongoing activities on lands or waters that are not already within the project boundary. We therefore clarify that PacifiCorp's performance of any activities funded pursuant to license Article 405 will not, without more, require any changes in the project boundary.

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<sup>7</sup>These are a Tributary Enhancement Program, for implementing habitat enhancement projects in the vicinity of the North Umpqua Project that are approved by Oregon Fish and Wildlife; a Long-Term Monitoring and Predation Control Fund, to formulate, implement, and monitor plans related to protection and reintroduction of anadromous fish populations; a Mitigation Fund, to be administered by the Forest Service to offset adverse impacts of the project on natural resources if those impacts are not otherwise addressed by the Agreement; and an Early Implementation Fund, to implement measures to be taken before the license becomes final.

<sup>8</sup>PacifiCorp asserts that the funds are to be used for protection, mitigation, and enhancement projects throughout the basin, not only for ones near the North Umpqua Project, and that a requirement to include all such projects within the North Umpqua Project boundary would only impair the flexibility to put those funds to their best uses within the watershed.

11. PacifiCorp also objects to certain requirements in Article 403 of the license that relate to the monitoring of information at project gauges. PacifiCorp explains that, under section 5.5 of the Agreement, it is required to install and maintain gauge stations at the head of bypass reaches or elsewhere as required by the Oregon Water Resources Department, for the purpose of monitoring compliance with instream flow regimes established in the Agreement. The Agreement also obligates PacifiCorp to install the monitoring stations by the date the new license becomes final or by 2002, whichever is earliest, and to develop, in consultation with the other settlement parties, a coordinated gauge installation plan and data reporting plan.

12. Article 403 requires the licensee to file for Commission approval a plan to monitor instream flows as specified in section 5.5 of the Agreement, which calls for the installation of certain new gauges.<sup>9</sup> The article adds that the plan must include a schedule for installing all flow-measuring devices, and a schedule for posting on the internet real-time flow data for the existing Boulder Creek gauge and all other project gauges.

13. PacifiCorp objects to the extension of the flow data requirement to gauges (other than at Boulder Creek) beyond those specifically defined in section 5.5 of the Agreement. It notes that, in the EIS, staff recommended that PacifiCorp post real-time data only for the Boulder Creek gauge “and all the project gauges described in the Settlement Agreement.”<sup>10</sup> PacifiCorp also states that, following consultation with the appropriate settlement parties, it has in fact already installed all the project gauges required by section 5.5.<sup>11</sup> It asks us to clarify that we need not approve the installation of these existing gauges, and to delete from Article 403 the requirement that no ground-disturbing or land-clearing activities for installation of the monitoring devices may begin until the

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<sup>9</sup>Section 5.5 of the Agreement describes the gauges to be installed as “at the head of the bypass reaches or elsewhere as required by [the Oregon Water Resources Department] to monitor compliance with the in-stream flow regimes identified in Appendix C, tables 1 and 2.”

<sup>10</sup>EIS at 2-64.

<sup>11</sup>Although PacifiCorp does not indicate when it installed the gauges, it is reasonable to infer that they were installed before issuance of the new license, especially since the Agreement specified a deadline of 2002 for their installation if a new license had not yet been issued.

Commission notifies the licensee that the instream flow-monitoring plan has been approved.

14. PacifiCorp correctly notes the EIS recommendation, and we will modify Article 403 accordingly. Because PacifiCorp has already installed the gauges required by the Agreement, we will modify Article 403 to delete the requirement for a schedule for installing them. However, maintenance and operation of the gauges remains a license requirement, regardless of the fact that they have already been installed, and the location of the gauges therefore remains subject to Commission approval in connection with approval of the monitoring plan. We will not, therefore, modify Article 403 to delete requirements relating to the gauges. If approval of the monitoring plan entails no changes to the location of the gauges, the article's language as to deferring ground-disturbing or land-clearing activities will have no practical effect.

15. Finally, PacifiCorp notes that Article 403, unlike section 5.5, requires it to consult with American Whitewater Affiliation on the flow-monitoring plan. While PacifiCorp does not object to consulting with American Whitewater, which is not a settlement party, it seeks clarification that the Commission did not intend to modify the Agreement to give American Whitewater any contractual approval or other rights under the Agreement. Although we have made consultation with American Whitewater a requirement of the license, we did not intend to alter the Agreement itself. The Agreement is a private contract, and we have no authority to alter it to afford contractual rights to entities that are not parties to it.

16. The Forest Service and Oregon Fish and Wildlife, in their letters in support of PacifiCorp's rehearing request, interpret PacifiCorp's request as asking us to clarify that we did not intend to give American Whitewater approval authority over the monitoring plans required by Article 403. This is not precisely what PacifiCorp has asked us to clarify. In any event, Article 403 requires only that PacifiCorp consult with American Whitewater and other entities before filing the instream flow monitoring plan; it does not require that American Whitewater or any other consulting entity approve the plan before it is filed for Commission approval.

#### **B. The Conservation Groups' Rehearing Request**

17. Although the Conservation Groups seek rehearing of our November 18 Order, the real object of their specification of error is the Section 4(e) conditions issued by the Forest Service, which the Commission adopted as mandatory license conditions. The Conservation Groups contend that the Forest Service erred in proposing mandatory terms and conditions that do not meet that agency's statutory duties, and that therefore the Commission erred in issuing a license that fails to comply with applicable laws.

18. The Conservation Groups argue that the Forest Service should have recommended removal of the Soda Springs dam, the project dam furthest downriver. Indeed, they assert, the Forest Service had advocated dam removal in the earliest stages of the settlement discussions, for the reason that only dam removal would satisfy the objectives of the Umpqua Forest Plan, as amended to include the Aquatic Conservation Strategy of the Northwest Forest Plan. However, the Forest Service changed its position after PacifiCorp withdrew from the negotiations over this issue in 1999.<sup>12</sup> The Conservation Groups contend that, in the watershed analysis that was undertaken by PacifiCorp and the Forest Service to resolve relicensing issues, and that formed the basis for the settlement agreement, sound scientific evidence supported removal of the Soda Springs dam as the highest priority for improvement of habitat connectivity and restoring hydrologic processes in the North Umpqua River.<sup>13</sup> They argue that, in filing final section 4(e) conditions that did not adopt its original position, the Forest Service failed to follow the recommendations of the watershed analysis, to address the negative impacts of leaving the Soda Springs dam in place, and to comply with its duties under the National Forest Management Act and the Umpqua Forest Plan. The Conservation Groups assert that such action in the face of the evidence was arbitrary and capricious.

19. The Conservation Groups also argue that the Forest Service failed to comply with the National Environmental Policy Act (NEPA) in not preparing an environmental assessment or environmental impact statement in connection with the formulation of the Section 4(e) conditions, which they allege constitutes a Federal action, since the conditions are mandatory license conditions. The Conservation Groups contend that, even if the Forest Service were entitled to rely on the Commission's EIS to support its conditions instead of preparing its own environmental document, the Commission's EIS in this proceeding would have been inadequate for that purpose, since the EIS does not compare alternatives that specifically address the Forest Service's legal duty under the

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<sup>12</sup>The Conservation Groups themselves originally participated in the settlement discussions but withdrew from them in September 2000.

<sup>13</sup>The Conservation Groups assert that the Soda Springs dam blocks upstream and downstream fish passage, disconnects most of the North Umpqua mainstem from its tributary of Fish Creek, substantially reduces sediment and spawning gravels to downstream areas, inundates one of the largest and highest-value spawning areas, and adversely affects water quality.

National Forest Management Act. They assert that the Forest Service must issue a final decision on its Section 4(e) conditions that is subject to appeal by the licensee and the public.

20. The Conservation Groups ask that we vacate our order and issue a new order that requires the removal of Soda Springs dam. The Conservation Groups' recommendation to remove that dam was evaluated in the EIS as part of the Non-Governmental Organization Alternative. The EIS contains findings that support the staff alternative, which, reflecting the Agreement, would provide fish passage at the Soda Springs dam, rather than the dam removal alternative.<sup>14</sup> The Conservation Groups do not present evidence on rehearing that would cause us to reconsider adopting the staff recommendation. Therefore, we will deny the Conservation Groups' request for rehearing.<sup>15</sup>

The Commission orders:

(A) The request for rehearing filed by PacifiCorp is granted to the extent indicated in this order.

(B) Paragraph (1) of Article 403 of the license is modified to read as follows:

(1) a schedule for resuming operation of the existing gauge at Boulder Creek (USGS gauge no. 14316495), posting real-time data on the internet for the Boulder Creek gauge and all of the project gauges described in section 5.5 of the Settlement Agreement, and providing notice to the public of scheduled maintenance releases at the project developments.

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<sup>14</sup> EIS at 5-3 through 5-5.

<sup>15</sup> To the extent the Conservation Groups allege procedural or evidentiary deficiencies in connection with the Section 4(e) conditions, it is not the Commission's role to evaluate the decision-making process that underlies the formulation of mandatory conditions. See *Bangor Hydro-Electric Co. v. FERC*, 78 F.3d 659 at 663 (D.C. Cir. 1996).

(C) The request for rehearing filed by Umpqua Watersheds, Umpqua Valley Audubon Society, Oregon Natural Resources Council, Steamboaters, the North Umpqua Foundation, Pacific Rivers Council, Oregon Trout, American Rivers, and Waterwatch of Oregon is denied.

By the Commission. Commissioner Kelly not participating.

( S E A L )

Magalie R. Salas,  
Secretary.